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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 960

COLBERG, INC., et al.,
Plaintiffs and Appellants,

vs.

STATE OF CALIFORNIA, ex rel.,
DEPARTMENT OF PUBLIC WORKS,
Defendant and Respondent.

STEPHENS MARINE, INC.,
Plaintiff and Appellant,

vs.

STATE OF CALIFORNIA, ex rel.,
DEPARTMENT OF PUBLIC WORKS,
Defendant and Respondent.

CONSOLIDATED CASES

Respondent's Brief in Opposition to Petition for a Writ of Certiorari

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I. Statement of the Case

Procedurally the petitioners are seeking review of an adverse decision by the California Supreme Court.

Substantively petitioners are attempting to remove California's navigable waterways from their proper category as a natural resource and redefine these navigable waters as private property.

The litigation has reached its present posture based on the following facts:

The State of California, in cooperation with the federal government, as a part of the National Interstate Highway System proposes to build two parallel highway bridges across the upper Stockton Channel in San Joaquin County, which is a navigable tidal waterway. This natural navigable channel connects with the San Joaquin River whose waters ultimately reach the Pacific Ocean.

The State of California has obtained the necessary permits for the construction of the bridges from the requisite government authorities. These authorities include the federal government which has complete and final determination regarding the vertical and horizontal clearances of navigable waters.[1] The federal government, acting by and through the Secretary of the Army and Chief of the Corps of Engineers held hearings and ultimately issued a permit establishing for the bridges a vertical clearance of 45 feet above the waters of the Upper Stockton Channel.

The petitioners, who are owners of shipyards located upstream from the proposed interstate highway bridges, filed declaratory relief actions alleging that they had somehow acquired a vested *private* prop-

[1] The permit is a conclusive determination that the bridge does not obstruct navigation, which determination has the force of law. *Miller* v. *City of New York*, 109 U.S. 385, 3 S.Ct. 228, 232–3; *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 33 S.Ct. 667, 672; *Southern Pac. Co.* v. *Olympian Dredging*, 260 U.S. 205, 43 S.Ct. 26, 27; *United States* v. *Appalachian Electric Power Co.*, 311 U.S., 377, 61 S.Ct. 291, 307; *Pacific Inter-Club Yacht Association* v. *Morris*, 197 F. Supp. 218, 220.

erty right to navigate to and from the oceans of the world with a vertical clearance of not less than 135 feet (this 135-foot limit is set by existing fixed highway bridges located between petitioners and the ocean).

Petitioners assert that a determination of this case will affect only their two shipyards. Such a position has only superficial accuracy. It is true that the ultimate decision will resolve an immediate conflict between litigants. However, the decision's impact goes far beyond two shipyards. Whether a short channel or a big river such as the Mississippi is involved, the same sweeping question arises:

> Are the navigable waters of a State subject to private ownership which could inhibit their development by the public in connection with other modes of commerce such as highways?

The California Supreme Court recognized the broad issue presented for its determination.

> "Indeed, plaintiffs, while scrupulously eschewing all claims based on a public right, have been forced into the position of extending a private right in a meandering continuum from their properties to the Pacific Ocean and, as counsel for the state observed at oral argument, now claim a property right in 'a column of air 135 feet high extending from their properties to the sea.' We cannot refrain from observing that were the bridge here involved proposed for the Carquinez Straits instead of the Upper Stockton Channel, plaintiffs, consistently with the theory of their

pleadings, would advance the same basic claim for compensation. If such claim could be considered valid for plaintiffs, it would also be assertible by the countless riparian owners in the intervening section of the watercourse." (Pet. A. 27)

"It should be noted that the 'private property' right upon which plaintiffs base their claims is of even larger scope than a simple right to navigate freely to the sea, for that right is not here curtailed except insofar as it concerns ships with fixed structures more than 45 feet above the waterline. Thus, the 'right of access' claimed by plaintiffs would seem to include a right to navigate to the sea in vessels of any size." (Pet. A. 37)

The California trial court rejected petitioners' arguments for the reasons that:

(1) A littoral or riparian owner does not have a *private property right* to downstream navigation. Navigation on navigable waterways is merely a privilege shared in common with the public and subject to public control which is not protected by the California or United States Constitutions.

(2) The State of California can regulate and control commerce on its navigable waters without the payment of compensation.

The California Supreme Court affirmed this trial court decision in an extensive and well-reasoned opinion. (Pet. A.Ex. 3) A subsequent petition for rehearing was denied without opinion.

II. The Scope of Private Access Rights in Navigable Waterways Depends Upon State Law

The division of State-Federal jurisdiction is accurately recounted by the California Supreme Court in its decision. The State is recognized as having absolute sovereign rights over its navigable waterways limited only by the paramount delegated powers of the federal government to regulate commerce. (Pet. A. 29)

Under this dichotomy of responsibility it is left for *State* law to determine the scope of *private* access or other rights in navigable waters. *Shively* v. *Bowlby,* 150 U.S. 1, 14 S. Ct. 548, 563; *U.S.* v. *Rands, 389* U.S. *121, 126;* 88 S. Ct. 265, 268.

The California Supreme Court has chosen to define the right to navigate to the oceans of the world as a public rather than a private right. In view of the weight of State and Federal authority supporting that position it is difficult to recognize a reason for further review by this Court. (See discussion III infra)

Petitioners also appear to be arguing that the State of California has usurped federal authority to regulate commerce by constructing the twin Interstate Highway Bridges. Such a position ignores the very fact which petitioners have conceded to be true.

The present bridge project was undertaken only *after* receiving approval from the federal govern-

ment. As indicated by the California Supreme Court's decision:

> ". . . Pursuant to federal law the state applied to the Secretary of the Army and the Chief of Engineers for a permit to build such bridges. (See 33 U.S.C.A. § 525, subd. (b).) After a public hearing, consideration of the views of various interested persons including these plaintiffs, and an extensive economic survey, approval of the location and plans of the bridges was granted by federal authorities in February 1964, subject to conditions not here necessary to be detailed." (Pet. A. 23–24)

It is this hearing and permit procedure which protects the rights of those engaged in navigation and commerce. Obviously a state cannot usurp the federal government's permit authority, since without a permit the structure would be an unlawful obstruction subject to immediate removal as a nuisance.

III. A Riparian or Littoral Owner Located on Navigable Waters Does Not and Should Not Have a Private Property Right to Navigate to the Waters of the World

As indicated earlier, the central issue presented throughout this appeal has been:

> Did petitoners have a *private* property right to navigate over public navigable waters with vessels exceeding 45 feet in vertical clearance?

Petitioners now allege that (1) the California Supreme Court did not resolve this issue, and (2) they resolved it improperly.

Contrary to petitioners' statements the California Supreme Court expressly and correctly decided the property question by stating:

> ". . . We are of the further view that the law of California burdens property riparian or littoral to navigable waters with a servitude commensurate with the power of the state over such navigable waters, and that 'when the act [of the state] is done, if it does not embrace the actual taking of property, but results merely in some injurious effect upon the property, the property owner must, for the sake of the general welfare, yield uncompensated obedience.' (Gray v. Reclamation District No. 1500, *supra,* 174 Cal. 622, 636.)" (Pet. A. 35)

The policy basis for their decision could not have been more clearly spelled out:

> ". . . The demands of modern commerce, the concentration of population in urban centers fronting on navigable waterways, the achievements of science in devising new methods of commercial intercourse—all of these factors require that the state, in determining the means by which the general welfare is best to be served through the utilization of navigable waters held in trust for the public, should not be burdened with an outmoded classification favoring one mode of utilization over another.
>
> "It is clear that the conclusions above expressed dispose of plaintiffs' contention that their right of access to the navigable waters fronting on their respective properties must, in order to be of utility, include the right to navigate freely to the sea.

> Whatever the scope and character of their right to have access to those navigable waters, we hold that such right is burdened with a servitude in favor of the state which comes into operation when the state properly exercises its power to control, regulate, and utilize such waters." (Pet. A. 37–38)

The result reached by the California Supreme Court is not the far out, unsupported, visceral reaction of a single maverick jurisdiction. The opinion is a well-reasoned, legally supported document arriving at a conclusion which is in accord with the result reached by prior California, non-California, and Federal decisions.

As acknowledged by the intermediate California appellate court which gave petitioners intermediate comfort:

> "According to the weight of authority, a littoral owner's right to navigate between his land and the world's oceans is not a private right, but one which he shares with the general public; hence he has no constitutional right of eminent domain compensation when a downstream bridge 'without draws' cuts him off from the outside world. ... ." (Pet. A. 7)

Such a concession is compelled by the authorities which overwhelmingly declare that the right to navigate is a *public* privilege not a *private* property right:

State Authorities:

Moore v. *State Road Department,* (Fla) 171 So. 2d 25, 28 (Upstream owners claimed new highway bridge would affect access to sea)

" '. . . The inability of sea-going vessels to navigate the channel to a point in front of plaintiffs' property resulting from the new bridge is an impairment of the public right of navigation which plaintiffs will suffer along with others. Their loss, if any, will be damnum absque injuria.' "

Frost v. *Washington County Ry. Co.,* (Me) 51 A. 806 (Railroad bridge over navigable water affecting access to sea)

"The only right of the plaintiff interfered with by the defendant company was his right of navigation by water in and out of the cove through the channel. This right of the plaintiff, however, was not his private property, nor even his private right. It could not be bought, sold, leased, or inherited. He did not earn it, create it, or acquire it. He did not own it as against the sovereign. The right was the right of the public, the title and control being in the sovereign in trust for the public, and not for any particular individual. . . ."

Marine Airways v. *State,* (N.Y.) 104 N.Y.S. 2d 964, 967, Affd. 116 N.Y.S. 2d 778 (Upstream shipbuilders sought damages resulting from highway bridge)

" 'Distinguished from the right of access is the right of navigation, which is exclusively a public right. One is not to be confused with the other. The bridge here was constructed in accordance with proper public authorization. The claim that it constitutes a public nuisance or an unlawful interference with navigation is not maintainable. Where there is a lawful interference with naviga-

tion, a member of the public has no right to compensation therefor, and the owner of land abutting the water is not in a better position to claim compensation so long as high right of access is not denied him. This view is supported by the weight of authority in this country. (Citations omitted.)' "

St. Regis Paper Co. v. *New Hampshire,* 26 A. 2d 832, 838 (State authorized dam across navigable river)

"Since the public right is not a private one, it follows that individual members of the public entitled to enjoy the right enjoy the right in a personal capacity only derivatively. Their rights are not property rights and are not vested. Strictly, the rights are more properly to be termed privileges, which may be taken away, altered or qualified. . . ."

Crary v. *State Highway Commission,* (Miss) 68 So. 2d 468, 472 (Highway bridge impaired use of riparian owner's frontage)

"In summary, we conclude that the erection by appellee of the bridge constitutes the imposing of an additional public use upon property (Gulf of Mexico) already set aside for public purposes."

State v. *Masheter,* (Ohio) 203 N. E. 2d 325, 327 (Highway bridge restricted vertical clearance for upstream owner)

"Every riparian owner has the right of ingress and egress between his land and the water. In addition, as a member of the public, he has the right to travel on navigable streams. It is important to distinguish these rights. The right to

go from his land to the river and from the river to his land is a private property right of the riparian owner. *Navigation on public waters is exclusively a public right.* Everyone has an equal right to the use of the water for travel and transportation." (Emphasis added)

Federal Authorities:

Miller v. *City of New York,* 109 U.S. 385, 3 S. Ct. 228, 233 (Upstream owner claimed Brooklyn Bridge would prevent sailing ships from reaching his docks)

" 'The plaintiff *is not deprived of his property nor of the enjoyment of it;* nor does he from that cause suffer any damage different in character from the rest of the public. . . .' " (Emphasis added)

U.S. v. *Commodore Park,* 324 U.S. 386, 65 S. Ct. 803, 805 (Dredger tailings from seaplane under construction blocked navigable waterway)

" 'Second. Nor does a riparian owner acquire a unique private right distinct from that held by all others, to have access to and enjoyment of navigable waters and to recover compensation from the government because deprived of that privilege by an authorized governmental change in a stream. . . .' "

U.S. v. *Rands,* 389 U.S. 121, 122–123, 88 S. Ct. 265, 266–267 (Lock and dam project prevented use of riparian land as a port site)

". . . 'The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the

United States * * *. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress.' Gilman v. City of Philadelphia, 70 U.S. (3 Wall.) 713, 724–725, 18 L.Ed. 96 (1865). . . ."

Bellaire, Benwood & Wheeling F. Co. v. *Interstate Bridge Co.*, 40 F.2d 323 (Highway bridge impaired operation of ferry)

" 'The plaintiff only shares in the public right. He had no right against the public. The sovereign had the absolute control of it, and could regulate, enlarge, limit or even destroy it, as he might deem best for the whole public and this without making or providing for any compensation to such individuals as might be inconvenienced or damaged thereby. . . .' "

Two additional and collateral arguments raised by petitioners merit clarification.

First petitioners contend that private access rights on navigable waterways must coincide with private access rights in highways. The California Supreme Court decision meets and disposes of the highway-waterway analogy as follows:

"We also reject plaintiffs' contention that our highway access cases (see Bacich v. Board of Control (1943) 23 Cal.2d 343; Breidert v. Southern Pac. Co. (1964) 61 Cal.2d 659) require that compensation be paid for any substantial impairment of plaintiffs' right of access. We are not persuaded that the analogy between highway access and navigational access will bear close scrutiny. The right of access to a land highway derives from the 'land

> service road' concept, whereby roads are conceived of as arteries constructed through condemnation of private land for the purpose of serving other land abutting on them, rather than for the purpose of serving public traffic passing over them. (See Note (1965) 38 So. Cal.L.Rev. 689, 690, and authorities cited in fn. 9 thereof.) Principles applicable to such a right cannot reasonably be extended to the case of navigable waterways, which constitute a natural resource retained within the public domain for the purpose of serving public traffic in accordance with the greatest common benefit." (Pet. A. 39–40)

This court as recently as November of 1967 similarly pointed out that ship access over navigable waters is a public resource not a private right. *U.S.* v. *Rands,* 389 U.S. 121, 126, 88 S. Ct. 265, 268.

The second collateral issue relates to ownership of the bed of the Stockton Channel. Petitioners allege that it *may* not be owned by the State of California. The same argument was made to and rejected by the California Supreme Court when it denied a Petition for Rehearing.

Possible *subsurface* ownership of the channel has no relevance in a determination of petitioners' downstream *surface* access rights, for several reasons:

1. Petitioners do not, and cannot themselves claim ownership of the channel bed. Therefore, its possible private ownership by third parties would not enhance their rights.

2. The construction of the twin bridges downstream does not impair petitioners' nonexistent use of the

channel bed. The sole issue here involves changes in the *surface* usage of a navigable waterway. For example, we are not concerned in this action with the effect a state-installed sewer pipe might have on an oyster bed. (cf. Lovejoy v. Norwalk, 112 Conn. 199)

3. Finally and most significantly the California Supreme Court decision does not rest on ownership of the channel bed. The *water* itself as a mechanism of transportation and commerce is the natural resource which the Court found inappropriate for private ownership. They held that the right to sail upon navigable waters is a public privilege which can be regulated in the interest of commerce without compensation. A riparian owner's private right to use the *bed* of a navigable channel which is owned by third parties must await another case for determination.

IV. Conclusion

The California Supreme Court's decision is in accord with both federal and state authority leaving no substantial federal question to be resolved by this Court.

The opinion and supporting record show conclusively that:

1. The construction of an interstate highway bridge downstream from petitioners' property affected only their public right of navigation and did not deprive petitioners of property rights in violation of the United States or California Constitutions.

2. California's authority to define the right to private usage of its navigable waterways has not been exceeded or abused.

3. *Subsurface* ownership was not a determining factor in delineating the scope of petitioners' right to use the *surface* of adjacent navigable waterways.

WHEREFORE, Respondent respectfully prays that the Petition for a Writ of Certiorari to the Supreme Court of the United States be denied.

Dated: January 18, 1968

Respectfully submitted,

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